Matter of Gizewski v Stanford
2014 NY Slip Op 33055(U)
September 30, 2014
Supreme Court, Franklin County
Docket Number: 2013-278
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

_____X

In the Matter of the Application of
MARK GIZEWSKI, #09-A-3745,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2013-0130.36
INDEX # 2013-278
ORI #NY016015J

TINA STANFORD, Chairwoman,
NYS Board of Parole,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Mark Gizewski, sworn to on February 9, 2013 and originally filed in Seneca County. By order dated March 15, 2013 the Supreme Court, Seneca County, transferred this proceeding to Franklin County. Petitioner, who is now an inmate at the Shawangunk Correctional Facility, is challenging the March 2012 decision denying him parole and directing that he be held for additional 24 months.

An Order to Show Cause was issued on March 25, 2013. Subsequent to the issuance of the Order to Show Cause the original *pro se* petition was replaced by the Petition of Mark Gizewski, by and through his attorney, Cheryl L. Kates-Benman, Esq., Verified on November 8, 2013 (hereinafter the Amended Petition). The Court has since received and reviewed respondent's Answer and Return, verified on December 19, 2013 and supported by the December 19, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge and by the Affirmation of Terence X. Tracey, Esq., Counsel to the New York State Board of Parole, dated December 9, 2013. The Court

has also received and reviewed counsel's Reply thereto, dated December 26, 2013 and filed in the Franklin County Clerk's office on December 30, 2013.

On June 16, 2009 petitioner was sentenced in Supreme Court, Kings County, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Attempted Criminal Possession of a Weapon 3°. At the time petitioner committed the criminal offense underlying the 2009 conviction he was at liberty under parole supervision from a previous Robbery 2° conviction/sentence that carried a maximum term of life.

After having been denied discretionary parole release on one prior occasion, petitioner made his second appearance before a Parole Board on March 20, 2012. Following that appearance a decision was rendered again denying him discretionary parole release and directing that he be held for an additional 24 months. The parole denial determination reads as follows:

> "FOLLOWING CAREFUL REVIEW AND DELIBERATION OF YOUR RECORD AND INTERVIEW, THIS PANEL CONCLUDES THAT DISCRETIONARY RELEASE IS NOT PRESENTLY WARRANTED DUE TO CONCERN FOR THE PUBLIC SAFETY AND WELFARE. THE FOLLOWING FACTORS WERE PROPERLY WEIGHED AND CONSIDERED. YOUR INSTANT OFFENSE IN BROOKLYN, IN JANUARY 2009, INVOLVED YOUR ILLEGAL POSSESSION OF A HAND GUN. YOUR CRIMINAL HISTORY INDICATES YOU WERE ON LIFE PAROLE AT THE TIME LESS THAN FIVE YEARS FROM A 1995 ROBBERY 2ND. YOUR INSTITUTIONAL PROGRAMMING INDICATES YOU HAVE BEEN DENIED AN EARNED ELIGIBILITY CERTIFICATE. YOUR DISCIPLINARY RECORD REFLECTS THREE TIER II AND TWO TIER III REPORTS. YOU HAVE SERVED SHU TIME. YOU HAVE APPROXIMATELY FIVE FELONIES AND THREE MISDEMEANORS. THIS IS YOUR THIRD STATE BID. YOU HAVE VIOLATED PAST PAROLE SUPERVISION. REQUIRED STATUTORY FACTORS HAVE BEEN CONSIDERED, INCLUDING YOUR RISK TO THE COMMUNITY, REHABILITATION EFFORTS, AND YOUR NEEDS FOR SUCCESSFUL COMMUNITY RE-ENTRY. YOUR DISCRETIONARY RELEASE, AT THIS

> TIME, WOULD THUS NOT BE COMPATIBLE WITH THE WELFARE OF SOCIETY AT LARGE, AND WOULD TEND TO DEPRECATE THE SERIOUSNESS OF THE INSTANT OFFENSE, AND UNDERMINE RESPECT FOR THE LAW."

Beginning in the summer of 2013, after he had timely taken and perfected a *pro se* administrative appeal from the March 2012 parole denial determination, petitioner has been represented by Cheryl L. Kates-Benman, Esq. She submitted to the Parole Board, on petitioner's behalf, a number of requests, including those for full Board review, reconsideration and medical parole, along with restated and additional grounds allegedly warranting reversal of the underlying parole denial determination. Counsel's additional submissions were considered, but by decision dated October 21, 2013 the Parole Board, upon recommendation of the DOCCS Parole Appeals Unit, affirmed the March 2012 parole denial determination. Soon thereafter the Amended Petition was filed.

Executive Law §259-i(2)(c)(A), as amended by L 2011, ch 62, part C , subpart A, §§38-f and 38-f-1, effective March 31, 2011, provides, in relevant part, as follows:

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates . . . (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior

> to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement . . ."

Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law (Executive Law §259-i(5) unless there has been a showing of irrationality bordering on impropriety. *See Silmon v. Travis,* 95 NY2d 470, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268*, Vasquez v. Dennis*on, 28 AD3d 908 and *Webb v. Travis*, 26 AD3d 614. Unless the petitioner makes a "convincing demonstration to the contrary" the Court must presume that the New York State Board of Parole acted properly in accordance with statutory requirements. *See Nankervis v. Dennison,* 30 AD3d 521*, Zane v. New York State Division of Parole*, 231 AD2d 848 and *Mc Lain v. Division of Parole*, 204 AD2d 456.

A Parole Board need not assign equal weight to each statutory factor it is required to consider in connection with a discretionary parole determination, nor is it required to expressly discuss each of those factors in its written decision. *See Montane v. Evans,* 116 AD3d 197*, lv granted* 23 NY3d 903*, Valentino v. Evans,* 92 AD3d 1054 and *Martin v. New York State Division of Parole*, 47 AD3d 1152. As noted by the Appellate Division, Third Department, the role of a court reviewing a parole denial determination ". . . is not to assess whether the Board gave the proper weight to the relevant factors, but only whether the Board followed the statutory guidelines and rendered a determination that is supported, and not contradicted, by the facts in the record. Nor could we effectively review the Board's weighing process, given that it is not required to state each factor that it considers, weigh each factor equally or grant parole as a reward for exemplary institutional

behavior." *Comfort v. New York State Division of Parole,* 68 AD3d 1295, 1296 (citations omitted).

In the case at bar, reviews of the Inmate Status Report and transcript of petitioner's March 20, 2012 Parole Board appearance reveal that the Board had before it information with respect to the appropriate statutory factors, including petitioner's therapeutic programing record, educational record, COMPAS ReEntry Risk Assessment Instrument, denial of an Earned Eligibility Certificate, disciplinary record, release plans/community support, prior criminal record and multiple prior parole violations, in addition to the circumstances of the crime underlying his incarceration. It is also clear from the Court's review of the transcript of the March 20, 2012 Parole Board appearance that the Board was aware of petitioner's severe physical disabilities[1] as well as petitioner's status as a beneficiary of The Thalidomide Trust which will provide petitioner with substantial financial support (approximately $114,000.00 or $125,000.00 per year) upon his release to parole supervision and continuing for the rest of his life. The Court, moreover, finds nothing in the hearing transcript to suggest that the Parole Board cut short petitioner's discussion of any relevant factor or otherwise prevented him from expressing clear and complete responses to its inquiries.

---

[1] In a July 12, 2013 letter to respondent Stanford, Dr. Martin Johnson, Director of The Thalidomide Trust summarized, in layman's terms as follows, some of petitioner's physical disabilities which were caused when his mother took the drug thalidomide prior to his birth: " . . .[H]e has deformed hands and arms. His hands have difficulty in grasping or manipulating, and with one prosthetic leg and a deformed hip on his good leg his mobility has always been badly impaired . . .He has experienced the severe and accelerating physical deterioration that is typical of our [The Thalidomide Trust's] beneficiaries as they have passed the age of 50 years, and he has chronic musculo-skeletal pain . . . [Petitioner] is among the top ten percent of most severely damaged thalidomide survivors on our register . . .I believe it is likely that if he is not released on parole his health will continue to deteriorate rapidly, and as far as I am aware it is unlikely he be able to access the very specialised [sic] health support he needs to help reduce the rate of physical deterioration."

In view of the above, the Court finds no basis to conclude that the Parole Board failed to consider relevant statutory factors. *See Zhang v. Travis*, 10 AD3d 828. Since the requisite statutory factors were considered, and given the narrow scope of judicial review of discretionary parole denial determinations, the Court finds no basis to conclude that the denial determination in this case was affected by irrationality boarding on impropriety as a result of the emphasis placed by the Board on the nature of the crime underlying petitioner's incarceration as well as his prior criminal record, multiple prior parole violations and disciplinary record. *See Thompson v. New York State Board of Parole,* 2014 NY Slip Op 06354, *Hamilton v. New York State Division of Parole,* 119 AD3d 1268 and *Vaughn v. Evans*, 98 AD3d 1158. In this regard the Court notes that although petitioner's physical disabilities are indeed profound (and, the record suggests, becoming more problematic as petitioner, who is now 54 years old, ages), such disabilities have affected petitioner since birth and thus his long record of multiple felony convictions, multiple parole violations and inmate disciplinary violations has played out in spite of such disabilities rather than prior to their onset. The circumstances of this case are distinguishable from those in *Friedgood v. New York State Board of Parole*, 22 AD3d 950, where the inmate committed a violent crime in 1977 - while presumably in reasonably good health - and was denied discretionary parole release more than 25 years later (at age 87) while then afflicted with " . . . debilitating medical conditions, which include terminal cancer, colostomy and incontinence . . ." In *Friedgood* the Appellate Division, Third Department, concluded that "[g]iven the unique features of petitioner's crime, his severe physical limitations and need for continuous medical care, we find the notion that he is prone to engage in violent conduct to be without any support in the record and so

irrational under the circumstances as to border on impropriety." *Id*. at 951 (citations omitted). Although under the facts and circumstances of this case the Court is not prepared to find that petitioner's profound physical disabilities constitute a basis to conclude that the parole denial determination at issue was affected by irrationality bordering on impropriety, it is noted that petitioner is already eligible to be re-considered for discretionary parole release and it is presumed that a detailed, up-to-date medical review of petitioner's disabilities will be undertaken as part of the re-consideration process.

Executive Law §259-c(4) was amended by L 2011, ch 62, part C, subpart A, §38-b, effective October 1, 2011, to provide that the New York State Board of Parole shall ". . . establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."[2] To the extent petitioner argues that the Parole Board failed to adopt rules or regulations implementing the above-referenced amendment to Executive Law §259-c(4), the Court finds that the promulgation of the October 5, 2011 memorandum from Andrea W. Evans, then Chairwoman, New York State Board of Parole, satisfied the Parole Board's obligations with respect to the 2011 amendments to Executive Law §259-c(4). *See Partee v. Evans*,

[2]Prior to the amendment the statute had provided, in relevant part, that the Board of Parole shall ". . . establish written guidelines for its use in making parole decisions as required by law . . . Such written guidelines may consider the use of a risk and needs assessment instrument to assist members of the state board of parole in determining which inmates may be released to parole supervision . . ."

117 AD3d 1258, *lv denied* 2014 NY Slip Op 82439, and *Montane v. Evans*, 116 AD3d 197, *lv granted* 23 NY3d 903.

Although petitioner correctly asserts that a Transitional Accountability Plan (TAP) was not prepared in conjunction with the discretionary parole release consideration process, the Court finds that this does not constitute a basis to overturn the March 2012 parole denial determination. As part of the same legislative enactment wherein Executive Law §§259-c(4) and 259-i(2)(c)(A) were amended (L 2011, ch 62, Part C, subpart A), a new Correction Law §71-a was added, as follows:

> "Upon admission of an inmate committed to the custody of the department [DOCCS] under an indeterminate or determinate sentence if imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision."

While Correction Law §71-a became effective on September 30, 2011, the Court finds nothing in the legislative enactment to suggest that it was intended to mandate the preparation of TAP's with respect to inmates - such as petitioner - already in DOCCS custody prior to the effective date of the statute. *See Rivera v. New York State Division of Parole*, 119 AD3d 1107.

With respect to the COMPAS ReEntry Risk Assessment instrument prepared in conjunction with the consideration of petitioner for discretionary parole release, the Court finds that none of the alleged irregularities/errors in the compilation/computation process were so pervasive as to warrant the reversal of the March 2012 parole denial determination, particularly where, as here, the written parole denial determination did not

specify any reliance on the quantified risk assessment determined through utilization of the COMPAS instrument. *See Khatib v. New York State Board of Parole*, 118 AD3d 1207, *Sutherland v. Evans*, 82 AD3d 1428 and *Restivo v. New York State Board of Parole*, 70 AD3d 1096. Rather, the statutory factors specified in the parole denial determination were the nature of the crime underlying petitioner's incarceration, his prior criminal record, his prior multiple parole violations, the denial of an earned eligibility certificate and petitioner's recent prison disciplinary record. In this regard it is noted that although the Appellate Division, Third Department has determined that a risk and needs assessment instrument (such as COMPAS) must be utilized in connection with post-September 30, 2011 parole release determinations (*see Linares v. Evans,* 112 AD3d 1056*, Malerba v. Evans,* 109 AD3d 1067, *lv denied* 22 NY3d 858 and *Garfield v. Evans*, 108 AD3d 830), this Court finds nothing in such cases, or the amended version of Executive Law §259-c(4), to suggest that the quantified risk assessment determined through utilization of the risk and needs assessment instrument supercedes the independent discretionary authority of the Parole Board to determine, based upon its consideration of the factors set forth in Executive Law §259-i(2)(c)(A), whether or not an inmate should be released to parole supervision. The "risk and need principles" that must be incorporated pursuant to the amended version of Executive Law §259-c(4), while intended to measure the rehabilitation of a prospective parolee as well as the likelihood that he/she would succeed under community-based parole supervision, serve only to " . . . assist members of the state board of parole in determining which inmates may be released to parole supervision . . ." Executive Law §259-c(4)(emphasis added). Thus, while the Parole Board was required to consider the COMPAS instrument when exercising its discretionary

authority to determine whether or not petitioner should be released from DOCCS custody to community-based parole supervision, it was not bound by the quantified results of the COMPAS assessment and was free to grant or deny parole based upon its independent assessment of the factors set forth in Executive Law §259-i(2)(c)(A). *See Rivera v. New York State Division of Parole,* 119 AD3d 1107 and *Partee v. Evans*, 40 Misc 3d 896, *aff'd* 117 AD3d 1258, *lv denied* 2014 NY Slip Op 82439.

The petitioner also argues that parole authorities failed to solicit imput from the attorney who represented him at the June 16, 2009 sentencing. The attorney in question, Albert Khafif, Esq., ultimately contacted the DOCCS Parole Appeals Unit by letter dated September 16, 2013. Near the outset of the letter Mr. Khafif stated as follows: "I was never contacted by the Board of Parole for any of his [petitioner's] parole hearings to provide an official statement regarding his release. In fact, I have not practiced law in almost two years and have not maintained an office for the practice of law. It is only when I was contacted by Ms. Kates-Benman that I became aware of Mr. Gizewski's parole status." In the Statement of Appeals Unit Findings & Recommendation, which was effectively incorporated by reference into the October 21, 2013 determination on administrative appeal affirming the March, 2012 parole denial determination, issue is taken with the assertion that Mr. Khafif was never contacted to provide an official statement concerning petitioner's potential parole release. According to the Appeals Unit, " . . . the agency's November 13, 2009 letter to him suffices to disapprove his assertion. There is nothing within the case records . . . to indicate that the November 13, 2009 letter was returned as undelivered. Mr. Khafif states that he has not practiced law in almost two years and has not maintained an office for the practice of law, but the November 13, 2009

letter predates that period, and is only a mere 4 months after [petitioner's] receipt into state custody. It would strain logic to believe that in November 2009, the United States Postal Service would not have forwarded the agency's letter to any new location Mr. Khafif might have moved to, if he had happened to move to a new address at any time shortly after [petitioner's] sentencing." The Appeals Unit, and thus the Parole Board, ultimately determined that Mr. Khafif's September 16, 2013 letter was not timely submitted with respect to the March 2012 parole denial determination but nevertheless " . . . is now part of the record available for [petitioner's] future parole consideration(s)." Under these circumstances the Court finds no basis to overturn the March 2012 parole denial determination. Mr. Khafif's letter adds little information to that which was previously before the Parole Board and, in any event, petitioner is already eligible for reconsideration for discretionary parole release and Mr. Khafif's letter will be part of the record in the reconsideration process.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: September 30, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice